Re Ng Seng Heng; ex p Mayban Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3-29-2983 OF 1995
ZULKEFLI J
21 JULY 2003

Bankruptcy *— Discharge — Application — Debts incurred as a result of speculation on the stock market — Debtor's assets not of a value equal to 50 dollars per centum of amount of his unsecured liabilities — Whether application for unconditional discharge ought to be allowed — Whether order for unconditional discharge if granted in such circumstances ought to be set aside*

Bankruptcy *— Official Assignee — Report of — Report of Official Assignee containing inaccurate facts — Report brief and inadequate — Order for discharge of bankrupt based on such report — Whether such order ought to be set aside*

The judgment debtor was adjudicated a bankrupt on 6 March 1997. The judgment creditor's solicitors wrote several letters to the official assignee's office to inquire on the status of the matter and to request a date for the first creditor's meeting. No immediate reply was received. The judgment debtor then filed an application for discharge dated 19 June 2002. The said application was however not served on the judgment creditor. The judgment creditor's solicitors were subsequently informed by letter dated 21 June 2002 from the High Court that the application was fixed for hearing on 25 September 2002. The judgment creditor then filed and served a notice of intention to oppose the application for discharge dated 22 August 2002. On 15 October 2002, the assistant official assignee filed his report under s 33(3) of the Bankruptcy Act 1967 ('the Act'). On 16 October 2002, the senior assistant registrar ('the SAR') heard the application for discharge and allowed the same. During submissions before the SAR, the official assignee confirmed that as at 16 October 2002, the first creditors' meeting had yet to be held. However, on the same date, the judgment creditor's solicitors received a notice dated 23 September 2002 from the assistant official assignee stating that the first creditor's meeting had been adjourned to 1 October 2002. The judgment creditor appealed against the order for discharge pursuant to s 92 of the Act.

Held, allowing the appeal with costs and setting aside the order for discharge:

(1) In view of the fact that the first creditors' meeting had not been held, it was questionable how the official assignee prepared the report dated 15 October 2002. The report must therefore have been put up without sufficient information from the creditors. Further the report stated that the judgment debtor was adjudicated a bankrupt because he failed to settle his monthly instalments to the bank as a result of a fall in the price of shares. This was not accurate. The judgment debtor was in fact adjudged

a bankrupt because he failed to settle his contra losses incurred as a result of speculating on the stock market. The judgment creditor was not a bank but a securities house. The official assignee's report dated 15 October 2002 was therefore erroneous (see p 768E–G).

(2) The official assignee's report was also brief and inadequate. It did not state whether any investigation was carried out to determine why the judgment debtor was adjudicated a bankrupt. The appears to have been no investigation into the question of why no payment was made by the judgment debtor until June 2002 when he made a lump sum payment of RM10,000. There also appeared to be no investigation as to where the money was derived from. Part of the report merely stated that no evidence of assets was produced but there was no mention of any investigation into the judgment debtor's assets. There was also no evidence of the official assignee having concerned himself with the pertinent question of whether the judgment debtor would be able to settle the full debt or at least 50% of the same (see pp 768G–769A).

(3) Section 33(4) of the Act inter alia provides that on proof of certain facts mentioned under s 33(6), the court may refuse an order for discharge, suspend for a specified time such order, suspend such order until a dividend of not less than 50% has been paid to creditors, or grant such order subject to certain conditions. On the facts, the judgment debtor's assets were not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities thereby proving the fact referred to under s 33(6)(m). The judgment debtor also incurred the losses as a result of speculating on the stock market thereby proving a fact under s 33(6)(e). It was also apparent from the Official Assignee's report that the dividend declared was insufficient and not a reasonable or fair amount to cover the debt incurred by the judgment debtor. There were therefore facts in existence to disallow the judgment debtor's application for an order for discharge and to prevent the unconditional discharge of the judgment debtor. Thus the judgment creditor's appeal should be allowed with costs. The SAR's order discharging the judgment debtor should be set aside (see pp 769D–770F).

[Bahasa Malaysia summary

Penghutang penghakiman telah dihukum bankrap pada 6 Mac 1997. Peguam si piutang penghakiman telah menulis beberapa pucuk surat kepada pegawai pemegang harta berkenaan status perkara itu dan memohon tarikh untuk mesyuarat si piutang pertama. Tidak terdapat jawapan segera. Penghutang penghakiman telah memfailkan permohonan pelepasan bertarikh 19 Jun 2002. Permohonan itu tidak disampaikan ke atas si piutang penghakiman. Peguam penghutang penghakiman kemudian diberitahu melalui surat bertarikh 21 Jun

2002 dari Mahkamah Tinggi bahawa permohonan itu ditetapkan untuk pendengaran pada 25 September 2002. Si piutang penghakiman telah memfailkan dan menyampaikan notis niat untuk membangkang permohonan untuk pelepasan yang bertarikh 22 Ogos 2002. Pada 15 Oktober 2002, timbalan pegawai pemegang harta telah memfailkan laporan beliau di bawah s 33(3) Akta Kebangkrapan 1967 ('Akta itu'). Pada 16 Oktober 2002, penolong kanan pendaftar ('PKP') telah mendengar permohonan pelepasan itu dan membenarkannya. Semasa hujahan di hadapan PKP, pegawai pemegang harta mengesahkan bahawa pada 16 Oktober 2002 mesyuarat si piutang pertama masih belum diadakan. Walau bagaimanapun, pada tarikh yang sama, peguam si piutang penghakiman menerima satu notis bertarikh 23 September 2002 dari timbalan pegawai pemegang harta yang menyatakan mesyuarat si piutang penghakiman pertama telah ditangguh ke 1 Oktober 2002. Si piutang penghakiman telah merayu terhadap perintah pelepasan mengikut s 92 Akta itu.

Diputuskan, membenarkan rayuan itu dengan kos dan mengetepikan perintah pelepasan:

(1) Memandangkan fakta bahawa mesyuarat si piutang pertama masih belum diadakan, ia boleh dipersoalkan bagaimana pegawai pemegang harta menyediakan laporan bertarikh 15 Oktober 2002. Laporan itu mesti telah dikeluarkan tanpa maklumat yang mencukupi. Lagipun, laporan itu menyatakan bahawa penghutang penghakiman telah dihukum bankrap kerana beliau gagal membayar ansuran bulanan beliau kepada bank disebabkan oleh kejatuhan harga saham. Penghutang penghakiman telah dihukum bankrap kerana beliau gagal menjelaskan kerugian beliau yang disebabkan oleh membuat spekulasi di bursa saham. Si piutang penghakiman bukan sebuah bank tetapi adalah rumah sekuriti. Laporan pegawai pemegang harta bertarikh 15 Oktober 2002 adalah salah (lihat ms 768E–G).

(2) Laporan pegawai pemegang harta adalah pendek dan tidak mencukupi. Laporan itu tidak menyatakan sama ada terdapat penyiasatan untuk menentukan sebab penghutang penghakiman dihukum bankrap. Tiada penyiasatan di atas persoalan kenapa tiada bayaran dibuat oleh penghutang penghakiman sehingga Jun 2002 apabila beliau membuat bayaran RM10,000. Juga tidak terdapat penyiasatan mengenai dari mana datangnya wang itu. Sebahagian daripada laporan itu hanya menyatakan bahawa tiada keterangan aset dikemukakan tetapi tidak disebutkan bahawa terdapat penyiasatan aset-aset penghutang penghakiman. Tiada keterangan pegawai pemegang harta melibatkan diri beliau dalam persoalan sama ada penghutang penghakiman dapat menjelaskan hutang penuh atau sekurang-kurangnya 50% hutang itu (lihat ms 768G–769A).

(3) Seksyen 33(4) Akta itu antara lain memperuntukkan bahawa pada bukti fakta-fakta tertentu yang disebutkan di dalam s 33(6), mahkamah boleh menolak perintah pelepasan, menggantung perintah itu untuk masa tertentu, menggantung perintah itu sehingga dividen tidak kurang dari 50% telah dibayar kepada si piutang-si piutang atau memberi perintah itu tertakluk kepada syarat-syarat. Pada fakta, aset-aset penghutang penghakiman bukan setara dengan 50 dolar per centum jumlah liabiliti beliau yang tidak bercagar dan ini membuktikan fakta yang dirujuk di bawah s 33(6)(m). Penghutang penghakiman juga telah menanggung kerugian sebagai akibat membuat spekulasi di dalam bursa saham dan oleh itu membuktikan fakta di bawah s 33(6)(e). Ia juga adalah jelas daripada laporan pegawai pemegang harta bahawa dividen yang diisytiharkan tidak mencukupi dan tidak munasabah untuk menjelaskan hutang oleh penghutang penghakiman. Terdapat fakta-fakta untuk menolak permohonan penghutang penghakiman untuk perintah pelepasan dan untuk menghalang pelepasan tanpa syarat penghutang penghakiman. Oleh itu, rayuan penghutang penghakiman patut dibenarkan dengan kos. Perintah PKP melepaskan penghutang penghakiman patut diketepikan (lihat ms 769D–770F).]

Notes

For cases on application of discharge of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1638–1641.

For cases on official assignee, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1831–1843.

Cases referred to

BBMB Factoring Bhd v Mariam bte Sasiman and another appeal [2002] 4 MLJ 20 (refd)

Per Pathmasingam Mavilaganan ex p Public Bank Bhd [2000] 2 CLJ 92 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 16, (2)(b), (c), (3), 31(1), 33, (3), (4), (6)(d), (e), (m)

Bankruptcy Rules 1969 r 196(3)

Selvamalar Alagaramam (*Preetha Pillay* with her) (*Skrine*) for the appellant/judgment creditor.

Judgment debtor appearing in person.

Istazz Hadyan (Official Assignee)

Zulkefli J:

This is an appeal by the judgment creditor against the decision of the senior assistant registrar in allowing the judgment debtor's application for an order of discharge as a bankrupt under s 33 of the Bankruptcy Act 1967 ('the Act'). The relevant background facts of this case are as follows:

(1) The judgment debtor was adjudicated a bankrupt via adjudication order and receiving order both dated 6 March 1997.

(2) Subsequently, the judgment creditor's solicitors, Messrs Skrine, wrote several letters to the official assignee's office to inquire on the status of the matter and to request for a date to be fixed for the first creditors' meeting. The said letters were dated 25 February 1998, 4 July 2000 and 24 April 2001.

(3) The judgment debtor filed his application for an order of discharge dated 19 June 2002.

(4) The said application for discharge was not served on the judgment creditor. The judgment creditor's solicitors, Messrs Skrine was informed vide a letter dated 21 June 2002 from High Court Malaya (Bankruptcy Division) that such an application had been filed and fixed for hearing on 25 September 2002.

(5) The judgment creditor filed the notice of intention to oppose the said application for discharge pursuant to r 196(3) of the Bankruptcy Rules 1969 dated 22 August 2002 and served the same on the judgment debtor and the official assignee.

(6) The assistant official assignee filed the laporan pegawai pemegang harta or official assignee's report dated 15 October 2002 under s 33(3) of the Act.

(7) On 16 October 2002, the senior assistant registrar heard the said application for discharge and allowed the same.

(8) On the same date, ie on 16 October 2002, Messrs Skrine received a notice dated 23 September 2002 from the assistant official assignee stating that the first creditors' meeting had been adjourned to 1 October 2002.

This appeal is filed under and pursuant to s 92 of the Act which provides as follows:

> (1)The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> (2)Orders in bankruptcy matters shall, at the instance of any persons aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

It is established that in an appeal of this nature, this court has the jurisdiction and in fact is duty bound to rehear the appeal on the facts and

merits unfettered by the decision and findings of the senior assistant registrar (see *BBMB Factoring Bhd v Mariam bte Sasiman and another appeal* [2002] 4 MLJ 20).

Conduct of the official asignee and the acceptability of his report dated 15 October 2002

In considering this appeal, I find it necessary to look into the conduct of the Official Assignee ('OA') as well as the acceptability of the official assignee's report dated 15 October 2002 prepared under s 33(3) of the Act ('the OA's report').

Section 33(3) of the Act states as follows:

> On the hearing of the application the court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

It is noted that Messrs Skrine had written to official assignee's office letters dated 25 February 1998, 4 July 2000 and 24 April 2001 requesting for the first creditors' meeting to be fixed. There was no response whatsoever from official assignee's office. Subsequently, on 16 October 2002, well after the said application for discharge had been filed, Messrs Skrine received by post a notice stating that the first creditors' meeting had been adjourned from 17 September 2002 to 1 October 2002. During submission before the senior assistant registrar on the said application for discharge on 16 October 2002, the official assignee did confirm that first creditors' meeting had not been held as yet. In view of the undisputed fact that the first creditors' meeting had not been held it is questionable how the official assignee prepared the report dated 15 October 2002. The OA's report must therefore have been put up without sufficient information from the creditors. Further, para 8 of OA's report states that the judgment debtor was adjudicated a bankrupt because he failed to settle his monthly instalments to the bank as a result of a fall in the price of shares. This is not accurate. The judgment debtor was adjudicated a bankrupt because he failed to settle his contra losses he had incurred as a result of speculating on the stock market. The judgment creditor is not a bank. The judgment creditor is a securities house. The OA's report dated 15 October 2002 in my view is therefore erroneous.

It is also noted that the OA's report is both brief and inadequate. It does not state whether any investigation was carried out to determine why the judgment debtor was adjudicated a bankrupt. From the records, the judgment debtor was adjudicated a bankrupt on 6 March 1997. There appears to have been no investigation into the question of why no payment was made by the judgment debtor until June 2002 when he made a lump

A sum payment of RM10,000. Neither does there appear to be any investigation as to where these monies were derived from. Paragraph 2 of the OA's report merely states that no evidence of assets was produced. There is no mention of any investigation into his assets. There is no evidence of the official assignee having concerned himself with the pertinent question of whether the judgment debtor would be able to settle the full B debt or at least 50% of same. Section 31(1) of the Act requires the official assignee to investigate the judgment debtor's exact financial standing. In *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311. The court in response to the official assignee's contention that it is up to the creditors to do their investigation, stated that the primary duty is upon the C official assignee. His Lordship Ian Chin J in his judgment on this point had this to say at p 315:

> The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed D can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

E *Non-compliance with the requirement of the law*

Section 33(4) of the Act, inter alia, provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been F paid to the creditors. Paragraph 2 of the OA's report states that the debtor's statement of affairs was filed by the bankrupt on 13 June 2002. Section 16(2)(b) of the Act provides that it should be filed within 21 days from the date of the receiving order unless an extension has been granted by the official assignee. Section 16(3) of the Act provides that if the debtor fails to do so without reasonable excuse, proof of which shall lie on him, he shall G be guilty of contempt of court and may be punished accordingly. There is no evidence by either the judgment debtor as a bankrupt or the official assignee that an extension was granted by the official assignee or that there was reasonable excuse for the judgment debtor's delay in filing the statement of affairs. On this point in the case, the court treated non-compliance of s 16(3) of the Act as very serious and imposed a custodial sentence on the judgment H debtor.

It is noted that section 33(4) of the Act also provides that on proof of the facts mentioned in sub-s 6, the court shall either refuse the order, suspend the order for a specified time, suspend the order until a dividend of not less than 50% has been paid to the creditors, or grant an order of I discharge subject to such conditions aforesaid. The facts mentioned in s 33(6) of the Act that are relevant to the present case include, inter alia, the following:

Section 33(6)(d) — that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities; A

Section 33(6)(e) — that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs; B

Section 33(6)(m) — that the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities, ...

A perusal of the OA's report showed that the bankrupt's (judgment debtor's) credit balance in his account is RM11,995.50 as compared to his debt of RM43,514.04 which is sufficient to declare dividends of approximately 17.4% to the creditors. Based on s 33(7) of the Act the OA's report is prima facie evidence. There is no evidence whatsoever from the bankrupt as to why his assets are insufficient to declare a dividend of 50%. It is therefore undisputed that the judgment debtor's assets are not of a value equal to 50 dollars per centum of the amount of his unsecured liabilities and thereby the fact as referred to in s 33(6)(m) is proved. This would surely mean that there would be no basis whatsoever to have allowed the judgment debtor's application for an order of discharge as a bankrupt. C D

In *Per Pathmasingam Mavilaganan ex p Public Bank Bhd* [2000] 2 CLJ 92, the court was of the opinion that the bankrupt in that case should not be discharged on account of the fact that his assets were sufficient to declare only a dividend of 31.27%. Furthermore, the judgment debtor in the instant case incurred the losses as a result of speculating on the stock market. Section 33(6)(e) refers to debts incurred as a result of speculations or gambling. There is therefore another fact in existence to prevent the unconditional discharge of the judgment debtor. From the contents of the OA's report it is apparent therefore that the dividend declared is insufficient and is not a reasonable or fair amount to cover the debt incurred by the judgment debtor. In my view, to allow the discharge of a judgment debtor on these terms will make a mockery of the execution proceedings available to creditors and of the provisions of law available to safeguard the interests of creditors. It will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors. E F G

For the reasons above stated, the appeal is allowed with costs and the senior assistant registrar's order of discharge as a bankrupt of the judgment debtor is hereby set aside.

Appeal allowed with costs and order for discharge set aside. H

Reported by Andrew Christopher Simon

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